

**From:** Farkas, Ilene S.  
**Sent:** Thursday, October 8, 2015 5:01 PM  
**To:** 'keisha@frankandrice.com'; Zakarin, Donald S.  
**Subject:** RE: Ferrara Report  
**Attachments:** Thinking Out Loud, Response to the Stewart Report.pdf  
  
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Attached please find the Response of Lawrence Ferrara, as promised. We are of course available to discuss this matter once you and your expert have had a chance to review the attached.

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**From:** keisha@frankandrice.com [mailto:Keisha@frankandrice.com]  
**Sent:** Thursday, October 08, 2015 3:03 PM  
**To:** Zakarin, Donald S.  
**Cc:** Farkas, Ilene S.  
**Subject:** Ferrara Report

Mr. Zakarin,

I am reaching out to see if you would forward a copy of Mr. Ferrara's report to us so that we may prepare for a substantive discussion with your office. Please let us know if, for any reason, you are not the correct party from which to request this information. Thank you very much.

Sincerely,

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**“LET’S GET IT ON” BY MARVIN GAYE AND ED TOWNSEND**

**AND**

**“THINKING OUT LOUD” BY ED SHEERAN AND AMY WADGE**

**A RESPONSE TO THE REPORT OF DR. ALEXANDER STEWART**

**I. INTRODUCTION AND SUMMARY**

1. My rank at New York University is Professor of Music, and my title is Director Emeritus of all studies (B.M. through Ph.D.) in Music and the Performing Arts in New York University's Steinhardt School. I have written and co-written published books and articles (in peer reviewed journals) regarding music analysis, methodologies in music research, and other scholarly areas related to music. I currently sit on editorial boards of peer-reviewed journals. I have provided analyses and opinions in connection with music copyright issues for more than 20 years. My *curriculum vitae* and Rule 26 disclosure are attached as Appendix 1.

2. Herein, I have been asked to respond to the report of Dr. Alexander Stewart dated June 3, 2015 (hereafter, “the Stewart report”). The Stewart report presents an analysis of “Let’s Get It On” written by Marvin Gaye and Ed Townsend (hereafter, “LGIO”), and “Thinking Out Loud” written by Ed Sheeran and Amy Wadge (hereafter, “TOL”). The Stewart report also comments on a report written by Mr. Anthony Ricigliano (which I have not read) and a “DRAFT” outline summary of findings I prepared in late March 2015 for Sony/ATV. I was informed by Sony/ATV in advance of that March 2015 preliminary analysis that Sony/ATV administers the publishing of *both* LGIO and TOL. My “DRAFT” outline summary referenced in the Stewart report was not dated nor was it signed. Therein, I summarized my preliminary analysis and findings.

3. In preparation for this response to the Stewart report, I reviewed my “DRAFT” outline summary and stand by my analysis and findings, namely, that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities between LGIO and TOL individually or in the aggregate. Thus, the Stewart report has not changed my findings or opinions regarding LGIO and TOL.

4. On the basis of a careful review of the Stewart report, it is my professional opinion that the Stewart report is rife with selective omission of expression and self-contradiction. Moreover, many purported similarities are too remote and manufactured to be of any significance, individually or in combination with other similarities presented in the Stewart report. Dr. Stewart's findings of purported melodic similarities lack any substance and rely on selective omission and self-contradiction to create similarities between fragments of longer melodies wherein no meaningful melodic similarity exists.

5. In addition, I have been asked to conduct a further but still “preliminary” search for prior art regarding the similarity between LGIO and TOL. Analyses and transcriptions of the prior art songs found in this preliminary search follow my response to the Stewart report.

## **II. DETAILED RESPONSE TO THE STEWART REPORT**

6. My response to the Stewart report is set forth immediately below. In order to facilitate the reading thereof with the Stewart report, the following is segmented as a page-by-page response. Citations from the Stewart report are placed in *italics*. The analysis in the Stewart report begins on page 2 therein.

II (A). PAGE 2 IN THE STEWART REPORT

7. Oddly, at the beginning of the analysis in his report, Dr. Stewart appears to be attempting to paint Ed Sheeran as less of a singer than Marvin Gaye, as cited immediately below.

*"The key centers are also similarly placed with the commercially-released version of TOL placed in the next lowest key from LGIO (a half step...below LGIO's key of E-flat major). Other live versions of TOL are placed even lower...perhaps reflecting Sheeran's more **limited vocal range**."* [p. 2, the Stewart report, emphasis added]

8. Not only is this irrelevant, but more importantly, Dr. Stewart cannot possibly know the full extent of Mr. Sheeran's vocal range. Ed Sheeran's melody in the studio version of TOL has a range of nearly two octaves – B2 to A4 – all sung in a "chest voice," i.e., not falsetto. Thus, there is nothing in Ed Sheeran's performances that suggests that his vocal range is "limited". As to Ed Sheeran's live versions of TOL being "placed in even lower" keys, this is a common practice for artists who tour heavily in order to avoid vocal strain. Such practice, in and of itself, is not an indication of a singer's "limited vocal range".

9. A large portion of page 2 in the Stewart report is the presentation of the overall form or structure of both the single and "deluxe" (or album) version of LGIO and the studio version of TOL. I disagree with several listings in Dr. Stewart's structural charts. By way of example, Dr. Stewart conflates the Chorus in both the single and album versions of LGIO into the Verse. Moreover, Dr. Stewart labels the sections starting at 0:49 and 2:32 of TOL as the "bridge". Generally, the section between the Verse and the Chorus that prepares the listener for the Chorus is called the "Pre-chorus." Dr. Stewart's choice of the term "bridge" makes TOL seem more similar to LGIO; later in his report he compares expression from the "bridges" of both songs.

10. My structural charts of LGIO and TOL are presented immediately below. The commencement time of each structural section is in the left margin.

LGIO (single version): Form

0:00 Verse 1  
0:25 Chorus 1  
0:48 Verse 2  
1:11 Verse 3  
1:34 Bridge 1  
2:19 Verse 4  
2:43 Chorus 2  
3:05 Bridge 2 (abbreviated)  
3:17 Outro

LGIO (album version): Form

0:00 Verse 1  
0:25 Chorus 1  
0:48 Verse 2  
1:11 Verse 3  
1:34 Bridge  
2:19 Verse 4  
2:43 Chorus 2  
3:05 Bridge 2  
3:51 Outro

TOL: Form

0:00 Verse 1 (Verse A at 0:00 and Verse B at 0:24)  
0:48 Pre-chorus 1  
1:13 Chorus 1  
1:43 Verse 2 (Verse A2 at 1:43 and Verse B2 at 2:07)

2:32 Pre-chorus 2  
2:56 Chorus 2  
3:26 Interlude (guitar solo)  
3:50 Chorus 3 (extended)

11. Staying with page 2 of the Stewart report and beginning at the bottom of that page, Dr. Stewart opines:

*"While the above structural analysis seems to suggest that the forms of the songs are different, it is important to note that the basic harmonic pattern and bass line underlying most of these sections remains the same."* [p. 2, the Stewart report]

In fact, there are no significant structural similarities between LGIO and TOL as charted in the Stewart report and above; the overall form or structure in these two songs is different.

## II (B). PAGE 3 IN THE STEWART REPORT

12. Dr. Stewart finds an occasional 'blue' third in the vocal performances in LGIO and TOL as follows:

*"Both songs occasionally deploy a 'blue' third (a third degree of the scale that is variably minor, major, or somewhere in-between)." [p. 3, the Stewart report]*

13. Dr. Stewart correctly explains that the pitch in a 'blue' third can be "somewhere in-between" half steps, which are the smallest notated pitches in Western music notation.<sup>1</sup> However, Dr. Stewart fails to acknowledge that an

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<sup>1</sup> The term "third" means that the pitch is on the "third" scale degree: major scales consist of seven scale degrees on scale degrees 1-7.

“occasional” ‘blue’ note is commonplace in soul ballads, a genre in which Dr. Stewart places LGIO and TOL on page 2 of his report. Moreover, Dr. Stewart fails to acknowledge that LGIO contains not just ‘blue’ thirds but many fully *flatted* thirds, i.e., notes that are fully a half-step lower than the third scale degree. By way of difference, TOL does *not* contain any fully flatted thirds.

14. On page 3, the Stewart report moves to the analysis of “Specific Musical Expression or Content”. Dr. Stewart’s (Musical) Example 1 *“provides the opening bass lines of each song.”* However, Dr. Stewart fails to acknowledge that his transcription is *not* the TOL “bass” part (i.e., the bass guitar), but rather it is the lowest voice of a *guitar* part that contains many other notes. This is clarified above the transcription in the middle of page 5 in my “DRAFT” outline summary as follows: “Bass line (as played on guitar)....” However, in a full report, which I did not present in my “DRAFT” outline summary, I would present a transcription of the full guitar part. Dr. Stewart’s report is not a “DRAFT” outline summary. In his presentation of the “basic bass line” (1) he fails to acknowledge that the notes he has transcribed are from the guitar, not the *bass* guitar, (2) he fails to provide a transcription of the full guitar part, and (3) as demonstrated later in this response, he fails to ever transcribe and analyze the actual bass part in TOL. Even in my “DRAFT” outline summary, I provide a transcription of an iteration of the actual bass part in TOL at the bottom of page 5 therein.

15. Musical Example 1 immediately below is a transcription of the full guitar part at the opening of TOL, i.e., the guitar part from which Dr. Stewart solely draws his analysis of the *bass* line in TOL. The lowest notes in this guitar part in TOL are different from the actual bass part in TOL as analyzed and transcribed in my “DRAFT” outline summary.

**MUSICAL EXAMPLE 1****“Thinking Out Loud”**

Guitar part at the opening

Time: 0:00



16. When the *bass* actually enters at 0:24 of TOL, it is *different* from the bass line of LGIO. This fact is illustrated in the comparative transcription of the LGIO and TOL bass parts in Musical Example 2 immediately below. The corresponding intervallic relationships (*i.e.*, the space between the pitches), the melodic contour, and the rhythmic durations of the bass notes are different in the bass parts in TOL and LGIO, illustrated in Musical Example 2 immediately below, and further discussed later in this response to the Stewart report.

**MUSICAL EXAMPLE 2****“Let’s Get It On” / “Thinking Out Loud”**

Comparative transcription of the bass parts in the key of D major

"Let's Get It On" 0:01

"Thinking Out Loud" 0:24

3

 Comparative transcription of the bass parts for "Let's Get It On" (LGIO) and "Thinking Out Loud" (TOL). The notation is on two staves in bass clef, key of D major (two sharps), and 4/4 time. The top staff represents LGIO starting at 0:01, and the bottom staff represents TOL starting at 0:24. The notes are aligned vertically to show comparison. The LGIO part consists of eighth and quarter notes, while the TOL part features more sustained notes with some eighth notes. A bracket labeled '3' is placed above the first measure of the LGIO staff. Both parts end with a double bar line.



17. Significantly, the Stewart report's references to the "bass line" of TOL all refer to the lowest voice of the *guitar*, as heard in the introduction of TOL. Dr. Stewart ignores the other *concurrent* notes in the guitar, which should be transcribed in any full report (as compared with a "DRAFT" outline summary). Dr. Stewart fails to transcribe and analyze *the actual bass line*, which, as objectively demonstrated in Musical Example 2 immediately above, *is much less similar* to the bass line in LGIO than any similarity between the lowest notes in the guitar part in TOL and the bass line in LGIO. This is just one example of selective *omission* and the resulting in a flawed and misleading analysis of the expression at issue placed in issue in the Stewart report.

18. Indeed and as noted above, at the bottom of page 5 in my "DRAFT" summary outline, I provide a transcription of the actual *bass part* (at 1:13) in the Chorus in TOL, which is obviously *not* the same as the bass line in LGIO as illustrated in Musical Example 3 below. (The bass lines are written an octave higher to facilitate the reading thereof, which is in keeping with conventional bass guitar transcriptions.) The transcription of the bass line at 1:13 in TOL in my "DRAFT" summary outline placed under the bass line in LGIO in Musical Example 3 below demonstrates similarities and *differences* between the actual bass parts in LGIO and TOL that are omitted in the Stewart report.

### MUSICAL EXAMPLE 3

#### “Let’s Get It On” / “Thinking Out Loud”

Comparative transcription of the bass parts in the key of D major

The image displays a comparative transcription of the bass parts for two songs, "Let's Get It On" and "Thinking Out Loud", in the key of D major. The notation is presented in two systems. The first system shows the beginning of each song: "Let's Get It On" at 0:01 and "Thinking Out Loud" at 1:13. The second system shows a later section of the songs, marked with a '3' above the staff, indicating a triplet. The notation uses bass clefs and a key signature of two sharps (F# and C#). The rhythm is 4/4. The notes are transcribed as follows:

**"Let's Get It On" 0:01:** The bass line starts with a half note D4, followed by a quarter note E4, a quarter note F#4, a quarter note G4, a quarter note A4, a quarter note B4, a quarter note C#5, and a quarter note D5.

**"Thinking Out Loud" 1:13:** The bass line starts with a half note D4, followed by a quarter note E4, a quarter note F#4, a quarter note G4, a quarter note A4, a quarter note B4, a quarter note C#5, and a quarter note D5.

**Triplet Section:** The triplet section shows the bass lines for both songs. The "Let's Get It On" line starts with a half note D4, followed by a quarter note E4, a quarter note F#4, a quarter note G4, a quarter note A4, a quarter note B4, a quarter note C#5, and a quarter note D5. The "Thinking Out Loud" line starts with a half note D4, followed by a quarter note E4, a quarter note F#4, a quarter note G4, a quarter note A4, a quarter note B4, a quarter note C#5, and a quarter note D5.

19. Thus, the Stewart report *omits* any transcription and analysis of the actual bass parts in TOL, and instead, *only* presents a *partial* transcription of a guitar part at the opening of TOL. This substantial omission results in a flawed and misleading analysis.

20. The transcription of the actual bass part in the Chorus in TOL (at 1:13) provided in my “DRAFT” outline summary objectively demonstrates that while there are similarities, there are many *differences* between the bass parts in LGIO and TOL. It is patently clear in the transcriptions of the bass parts in my “DRAFT” outline summary that, contrary to Dr. Stewart’s unsupported finding, the bass parts in LGIO and TOL are not even remotely “nearly identical”.

21. Dr. Stewart’s full report completely *omits* any transcription of even one of the many bass part patterns in TOL, and he fails to acknowledge that the only “bass line” in TOL used in his analysis consists of the lowest notes in a

*guitar part* in TOL. Within this context of selective omission and the resultant flawed and misleading analysis of the expression he places at issue, Dr. Stewart finds that the bass lines in LGIO and TOL are “nearly identical” and places them in the “foundation” of his analysis. (See p. 3 in the Stewart report.) The actual bass part in TOL is different from the bass part in LGIO. The Stewart report fails to properly compare the actual bass part in TOL with that in LGIO.

## II (C). PAGE 4 IN THE STEWART REPORT

22. Now turning to page 4 in the Stewart report, Dr. Stewart’s “graphic representation” only compares the *bass* part in LGIO with the lowest voice of the *guitar* part in TOL. This omission has been sufficiently explained above regarding the actual bass part in TOL and the resultant flawed and misleading analysis in the Stewart report.

23. Moreover, Dr. Stewart’s “graphic representation” *omits* two notes that occur on beat “4+” in LGIO. By way of this *selective omission*, Dr. Stewart’s “graphic representation” (on page 4 of his report) contradicts his own transcription (on page 3 of his report) of the bass line in LGIO which includes those two notes omitted in his graphic representation a page later.

24. In omitting the actual bass part in TOL and delimiting his analysis to the lowest notes in the guitar part, Dr. Stewart misses the actual bass part in TOL as follows:

*“Note once again that each bass line begins on the upper tonic (“D8”) before descending a sixth to the third of the scale. This downward leap is a signature element of the melodic contour and contributes significantly to the melodic flow of the bass line and the underlying groove (a large fall followed by a steady upward rise*

*back to the first beat of the two-measure pattern).*" [p. 4, the Stewart report]

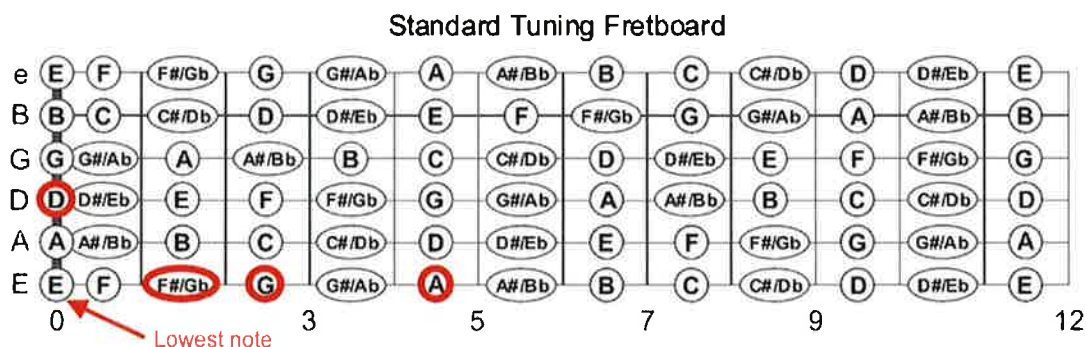
25. In fact, while the bass part in LGIO *does* "leap" downward the interval<sup>2</sup> of a sixth to scale degree 3 (scale degree 3 is the "third of the scale"), the *bass part* in TOL does *not* descend the interval of a sixth to scale degree 3. Rather, the actual bass part in TOL *ascends* the interval of a major third. Dr. Stewart's finding in the citation immediately above is the result of his omission of the actual bass part in TOL: the Stewart report only presents an analysis of some (but not all) of the notes in the opening *guitar* part in TOL but he *never* transcribes and analyzes any actual *bass part* in TOL. Dr. Stewart never informs his reader that his transcriptions and graphic representation of the "bass line" in TOL (1) omit the actual *bass part* and instead, (2) use some but not all of the notes in a *guitar* part. Thus, in addition to omitting the actual *bass part* in TOL, the Stewart report omits concurrent notes in the guitar part. (See the transcription of the full guitar part at the opening of TOL in Musical Example 1 on page 7 above.) While it is perfectly acceptable to include a transcription of the lowest notes in the opening guitar part in the analysis, (1) the omission of the fact that these are only the lowest notes in a fuller guitar part and (2) the complete omission of the actual bass parts in TOL from a purported analysis of the "bass lines" in TOL is misleading because Dr. Stewart's *analysis* of the "bass line" in TOL is *not* at all drawn from the actual *bass part* in TOL.

26. As to the "descending sixth to the third of the scale" referenced in the Stewart report citation immediately above, the bottom voice of the *guitar* in TOL does make this downward leap of a sixth to the third of the scale. However, Dr. Stewart omits, or is unaware, that there is a very practical reason for the

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<sup>2</sup> An interval is the space between two pitches. The space between two pitches can be "stepwise" or "leap": a "stepwise" interval moves to an adjacent scale degree such as scale from degree 1 to 2 or scale degree 3 to 4, whereas a "leap" *skips* one or more scale degrees such as from scale degree 1 to 6, or scale degree 1 to 3.

“descending sixth to the third of the scale” in the *guitar* part. The lowest note on a guitar is E. In its recorded key of D major, by necessity, the lowest note (or “voice”) of the guitar part in TOL *must* start an octave higher in order to play a D in the recorded key. The lowest note in the guitar part then leaps down to F# to complete the line in the lower register. The diagram below shows the notes in the bottom voice of the TOL guitar circled in red.



27. Importantly, if this downward leap of a sixth to scale degree 3 were an aesthetic choice in TOL meant to contribute to the “melodic flow,” rather than a physical limitation of the instrument, it would follow that the *bass part* in TOL would replicate this choice when it enters at 0:24 in TOL. On the contrary, the “descending [interval of a] sixth to the third of the scale” *never occurs in the bass line* in TOL. Clearly, this fact refutes any claim that the bass line in TOL was *copied* from the bass line in LGIO. In fact, the bass lines in LGIO and TOL are not the same; they embody many differences which the Stewart report fails to analyze. For example, just with respect to the “downward leap of a sixth to scale degree 3” and the overall melodic contour or shape of the bass parts transcribed in Musical Examples 2 and 3 above:

- The bass in measure 1 in LGIO *descends a sixth*, but the bass in measure 1 in TOL *ascends a third*, and LGIO and TOL have opposite melodic contours in their respective measure 1;
- The bass in measure 2 in LGIO consists only of “stepwise” intervals (see footnote 2 above), but the bass in measure 2 in TOL includes a “leap” of a sixth (to scale degree 7), and LGIO and TOL have very different melodic contours in their respective measure 2;
- The bass in measure 3 in LGIO *descends a sixth*, but the bass in measure 3 in TOL *ascends a third*, and LGIO and TOL have opposite melodic contours in their respective measure 3; and
- The bass in measure 4 in LGIO *ascends a third*, but the bass in measure 4 in TOL *descends a sixth* (to scale degree 7), and LGIO and TOL have opposite melodic contours in their respective measure 4.

28. Dr. Stewart acknowledges in a footnote at the bottom of page 4 of his report that there is a “slightly different bass part” that enters at 0:24 of TOL. He fails to provide any transcription or analysis of that bass part. Moreover, the differences are much more than “slight”. Importantly, if Dr. Stewart believes that the downward leap of the interval of a sixth to scale degree 3 is a “signature element” of the bass line (which is what he writes in his report), how can he then describe a bass line at 0:24 of TOL that *lacks* this “signature” leap of a sixth to scale degree 3 as only “slightly different”. In the same footnote, Dr. Stewart claims that “the two live versions of TOL contain the descending sixth throughout most of the song.” Contrarily, I reviewed those performances and found:

- (a) The “TOL/LGIO” performance at <https://youtu.be/RxZiVZKVN7k> is a solo performance by Ed Sheeran without a bass player, in which he is

plays the *guitar* and thereby descends a “sixth” for the practical (guitar) reasons illustrated and explained above; and

- (b) The bass player in the live “TOL” performance at [https://youtu.be/9jTo\\_0Fqzg](https://youtu.be/9jTo_0Fqzg) tends to double the lowest voice of the guitar during the introduction, but thereafter almost always leaps *up* the interval of a major third, *not* down the interval of a minor sixth.

29. On page 4, the Stewart report segues to an analysis of the drum patterns in LGIO and TOL and finds that “*The basic drum pattern in both songs is also identical.*” However, the drum patterns are *not* identical as Dr. Stewart claims: (1) Dr. Stewart’s transcription adds a kick attack (or hit) on beat 4 of TOL, but that attack is not there, and (2) his transcription adds a hi-hat hit on beat “1&” in the first bar of LGIO, but that attack is not there, as illustrated in Musical Example 4 below. The actual similarities between the drum patterns in LGIO and TOL are:

- Eighth notes in the hi-hats (which is exceedingly commonplace);
- Backbeats (beats 2 and 4) in the snare drum (which is a musical building block in numerous genres of popular music); and
- A kick drum pattern that is *not* identical, the similarity of which is found in at least two student drum method books.

**MUSICAL EXAMPLE 4****“Let’s Get It On” / “Thinking Out Loud”**

Comparative transcription of the drums

The image displays a comparative transcription of drum patterns for two songs. The top section, labeled "Let's Get It On" 0:01, shows a drum pattern on a single staff with a treble clef and a key signature of one flat. The pattern consists of a series of eighth notes and quarter notes, with 'x' marks indicating specific attacks. The bottom section, labeled "Thinking Out Loud" 0:24, shows a similar drum pattern on a single staff with a treble clef and a key signature of one flat. This pattern also consists of eighth notes and quarter notes, with 'x' marks indicating attacks. The notation is presented in a comparative format, allowing for a side-by-side comparison of the two drum parts.

30. The combined kick and snare drum pattern in TOL (which, as noted above, does *not* include an attack on beat 4) is the same *kick and snare drum pattern* that occurs in Toni Basil's huge 1982 hit, "Mickey." Tellingly, while Dr. Stewart transcribes the drum part at 0:24 in TOL in Example 2, nowhere does he transcribe the bass guitar part at 0:24 in TOL. On the other hand, in Example 3 on page 5 of his report, Dr. Stewart transcribes the bass part *and* the drums in LGIO. The Stewart report effectively hides the fact that the bass parts in TOL and LGIO are different, including the absence of the descent of an interval of a sixth to scale degree 3 in the bass part in TOL.

31. Moreover, the "bass line" extraction from the guitar part to which Dr. Stewart delimits his analysis of the bass in TOL does *not* play with the drums at the opening of TOL. In the opening of TOL, percussive-like attacks are played on the guitar by what sounds like striking the guitar strings with the right hand while deadening them with the left hand. These attacks are notated with x's in



the full guitar part transcription in Musical Example 1 above. Thus, the drum part in TOL is *not combined* with the guitar part in the opening of TOL.

II (D). PAGE 5 IN THE STEWART REPORT

32. At the top of page 5 in the Stewart report, Dr. Stewart opines:

*"This **distinctive** drum part both accentuates the syncopation in the bass line and emphasizes beat four by placing a... "kick" drum along with the snare on beat four."* [p. 5, the Stewart report, emphasis added]

33. As explained above, the kick and snare drum pattern in TOL is not "distinctive", is found in a student drum method book, and lacks the kick on beat 4 that Stewart transcribes.

34. Further to the drum patterns and as a rebuttal to my "DRAFT" outline summary, Dr. Stewart opines:

*"Dr. Ferrara could not have listened closely or transcribed any of the drums parts when he made the statement 'There are no **significant** rhythmic similarities, other than the similarities in harmonic rhythm and the rhythm of the bass lines', (undated Ferrara report). [p. 5, the Stewart report, emphasis added]*

35. Putting aside the fact that my "DRAFT" outline summary is "a preliminary analysis" as noted on page 4 therein (and not even remotely a full report such as the Stewart report purports to be), *all* of the rhythmic similarities in the drums are unremarkable. The similarity in the drum patterns in LGIO and TOL are not even remotely "significant", as correctly analyzed in the citation from

my “DRAFT” outline summary in the Stewart report presented immediately above.

36. Also on page 5, the Stewart report segues to an analysis of the opening melody in LGIO and TOL and finds that:

*“The **main theme** of TOL is derived from the opening theme of LGIO.”* [p. 5, the Stewart report, emphasis added]

Dr. Stewart appears to be using the term, “main theme”, in an attempt to elevate the importance of this opening melody in TOL. In fact, the opening melody in TOL is hardly the “main theme” of TOL. This melody occurs twice in each Verse, but there are many other repeated melodies in TOL including in the Chorus. Dr. Stewart fails to provide any musicological support as to why this melody is the “main theme” in TOL.

37. Continuing with the opening melody in TOL, Dr. Stewart further opines:

*“In TOL this phrase and very close variations of it are heard eight times where they form the A verse.”* [p. 5, the Stewart report]

Dr. Stewart’s statement cited immediately above implies that the melodic phrase structure of the “A verse” or what I term “Verse A” in TOL (see my structural chart on page 4 above) is AAAA. Dr. Stewart’s finding implies that all of the melodic phrases in Verse A in TOL are the same or nearly the same. In reality, the melodic phrase structure of Verse A in TOL (from 0:00 to 0:23) is an ABAB (not AAAA) melodic phrase structure. For example, the melodies in Verse A of TOL consist of the following pitch sequences identified as scale degrees immediately below.

Pitch sequences in Verse 1 of TOL

Phrase 1: 3 5 6 5 3 2 1 2 3 6 1

Phrase 2: 3 5 6 5 3 3 2 1 1

Phrase 3: 3 5 6 5 3 2 1 2 3 6 1

Phrase 4: 3 5 6 5 3 2 1 1

38. As emphasized in the chart immediately above, the ending in Phrases 1 and 3 (ending with scale degrees **1-2-3-6-1**) is very different than the ending in Phrases 2 and 4 (ending with scale degrees **2-1-1**). In fact, Phrases 1 and 2 combine to create a “call-and-response” melodic phrase structure (which is an “AB” melodic phrase structure), as do Phrases 3 and 4. Thus, the melodic phrase structure of the 4 phrases in Verse A is ABAB, not AAAA. This is strong musicological evidence that Verse A in TOL consists of a consistent call-and-response melodic phrase structure, not an opening statement followed by variations, as Dr. Stewart’s analysis implies. Moreover and by way of difference, there is no set form in the melodic phrases structures in the Verses of LGIO, which contain considerable melodic phrase structure variety. Thus, Dr. Stewart’s analysis here is not only wrong, it fails to provide any musicological evidence that any, let alone all four, of the melodic phrases in Verse A in TOL are copied from the first melodic line of LGIO.

39. In addition, Dr. Stewart’s description of the number of occurrences of (what he terms) the “main theme” and “variations” in TOL is unclear. On page 5, he writes that they are heard “eight times where they form the A verse.” However, in fact, Verse A in TOL has 4 phrases not 8 phrases. As analyzed in the structural chart in both the Stewart report and on page 4 above, Verse 1 in TOL consists of Verse A (what Dr. Stewart terms the “A verse”) and Verse B. Dr. Stewart does not offer any analysis of the melodies in Verse B in TOL, which are different from the melodies in Verse A in TOL. Thus, if Dr. Stewart is claiming that all of the melodies in Verse A and Verse B in TOL are essentially the same, he not only failed to provide any analysis of the melodies in Verse B, he also

ignored the substantial differences in the melodies in Verse B as compared with Verse A in TOL. If he is referring to Verse A within Verse 1, and Verse A within Verse 2 (see page 4 above), he has not made that clear.

## II (E). PAGE 6 OF THE STEWART REPORT

40. On page 6 of his report, Dr. Stewart uses cherry picking and flawed logic to reduce the opening melodies in LGIO and TOL to the same pitch sequence. He writes:

*“Taking the pitches to which **the first eight syllables** of each song are set yields:*

*LGIO 3 4 5 4 3 2 1 2*

*TOL 3 5 6 5 3 2 1 2”* [p. 6, the Stewart report, emphasis added]

Thus, Dr. Stewart compares only the “first eight syllables” (i.e., the first eight *pitches*) of the opening melodic phrases. He does not explain why he *omits the last three syllables (i.e., 3 pitches)* of the melody in TOL, which he charts earlier on page 6 of his report as pitches **3-6-1**. Nor does he explain why he *omits one of the scale degree “2” pitches* in LGIO, which he also charts earlier on page 6 of his report. And contrary to his own transcription at the top of page 6 in his report, Dr. Stewart’s scale degree numbers cited above completely ignore and *omit* the difference between scale degree 3 in TOL and scale degree (flatted) “b3” in LGIO, labeling both “3” which is misleading and incorrect.

41. Dr. Stewart’s selective and unexplained omission of (1) 1 note in the LGIO melody, (2) 3 notes in the TOL, and (3) the different scale degree “3” as compared with a flatted scale degree “b3”, expose a flawed and misleading analysis caused. These omissions hide the differences in the melodies under analysis in LGIO and TOL. Moreover, even with these selective omissions of

differences, the pitches in the melodies with the omissions are still *not the same* as charted by Dr. Stewart and cited in Paragraph 40 above. Namely, the sequence in the opening four pitches “3 4 5 4” in LGIO is obviously *not* the same as “3 5 6 5” in TOL.

42. Moreover and very significantly, Dr. Stewart fails to acknowledge the differences in the *melodic rhythms* in the melodies he is analyzing in LGIO and TOL. As transcribed at the top of page 6 in the Stewart report, the rhythmic durations of the notes in the melodies he places in issue are different.

43. In the middle of its page 6, the Stewart report continues as follows:

*“The only difference is that the three notes following the first pitch are raised by one scale degree – 454 becomes 565. I will discuss this further below.”* [p. 6, the Stewart report]

Dr. Stewart’s selective omission of three notes in the melodies merely results in finding that both melodies start on scale degree “3”, are separated by three *different* pitches, and then end on pitches “3212”. Once again, Dr. Stewart ignores the significant fact that these fragmented similarities in pitches embody significant *differences* in their melodic rhythms. Moreover, Dr. Stewart’s flawed analysis must be understood within the context of his substantial omission. The eight pitches he is analyzing correspond to the nine-pitch melody in LGIO and the eleven-pitch melody in TOL he transcribed and charted earlier on page 6 in his report, and to get to 8 notes, Dr. Stewart *omitted* (1) one note in the LGIO melody, (2) three notes in the TOL melody, and (3) the different scale degree “3” as compared with a flatted scale degree “b3”. Thus, after all of these selective omissions, the Stewart report’s manufactured 8-pitch sequences in LGIO and TOL still have three pitches that are different, and as per Dr. Stewart’s own transcriptions, the rhythmic durations of those pitches are very different.

44. In his second analysis (which immediately follows the first on page 6 of his report), Dr. Stewart further renders the pitch sequences as follows:

“LGIO	3 4 5 4 3 2 2 1 2
TOL	3 5 6 5 3 2 (1) 2 3 (6) 1” [p. 6, the Stewart report]

The second “2” pitch in LGIO which was omitted in Dr. Stewart’s earlier comparison (see paragraph 40 above), has suddenly returned, and two of the TOL pitches (“1” and “6”) are placed in parentheses because “melodically they function as neighbor and/or because of their extremely brief duration and weak rhythmic placement”. Moreover, in the next chart of the pitches in the same melodies at the bottom of page 6 in the Stewart report, these “parenthetical” pitches are *omitted* from the analysis completely and Dr. Stewart *mistakenly* adds an additional pitch “2” in TOL as follows:

TOL at the bottom of page 6:      3 5 6 5 3 2 2 3 1

This additional pitch “2” in TOL contradicts Dr. Stewart’s own transcription of the melody in TOL at the top of page 6 of his report. One might consider this a “typo”, but as demonstrated below, all of the further charts of this melody in TOL on page 7 in the Stewart report continue this *mistaken* addition of pitch “2” in the melody in TOL Dr. Stewart places in issue.

45. Staying with page 6, in the second charted sequence from the bottom of page 6 in his report, Dr. Stewart also places the “6” in TOL in parenthesis, assumedly because of its “extremely brief duration and weak rhythmic placement”. However the presence of the pitch on scale degree “6” significantly alters the melodic contour and lends a very different resolution of the melody in TOL as compared with the melody in LGIO as transcribed by Dr. Stewart at the top of page 6 in his report. Far from being a one-time throwaway note, this scale degree “6” (not to be confused with a descending interval of a

"sixth") occurs consistently in three out of the four Verse A melodic phrases in TOL. Furthermore, the *omission* of this scale degree "6" in the final scale degree chart at the bottom of page 6 of the Stewart report hides a significant melodic difference from LGIO, and like the many other instances of omission in the Stewart report, undermines the credibility of the analyses and findings therein.

## II (F). PAGE 7 IN THE STEWART REPORT

46. At the top of page 7 in his report, Dr. Stewart opines:

*"Once again the main difference can be found in the second, third, and fourth pitches. Each of these pitches is raised one step: from 454 to 565."* [p. 7, the Stewart report]

Earlier on page 6, Dr. Stewart found it significant that the "454" pitch sequence in LGIO is "raised one step" to "565" in TOL. But in the first paragraph on page 7 of his report, Dr. Stewart finds that the "4" pitches in LGIO and the "6" pitch in TOL are parenthetical and unimportant. Thus, "454" becomes "(4)5(4)" and "565" becomes "5(6)5" in the chart at the top of page 7 in the Stewart report.

47. After *omitting* the pitches he deems to be unimportant, Dr. Stewart finds that the "essential melodic gesture" is 3532212 in LGIO and 353221 in TOL and that "the only significant difference between the phrases...is that LGIO ends with an upward motion to 2". [p. 7, the Stewart report] However, as noted above, Dr. Stewart's pitch sequence of the melody in TOL is mistaken, and contradicts this transcription at the top of page 6 and the first three charts of pitch sequences on page 6 of this report. Thus, (1) the respective nine-note and eleven-note melodies in LGIO and TOL transcribed and charted at the top of page 6 are further reduced respectively to seven-note and six-note melodies and (2) the six-note melody that is charted by Dr. Stewart contradicts his transcription and three charts on page 6 of his report. Dr. Stewart's selectively omitting and

mistaken charts on pages 6 and 7 of his report are copied immediately below wherein scale degrees in **bold** font represent notes that are included on page 6, but then omitted on page 7, and pitch “**2**” in TOL is in bold and italics because it is not included in the TOL melody as transcribed on page 6 in the Stewart report.

p. 6	LGIO:	3 <b>4</b> 5 <b>4</b> 3 2 2 1 2	two notes on p. 6
p. 7	LGIO:	3 5 3 2 2 1 2	are omitted on page 7
p. 6	TOL:	3 <b>5</b> <b>6</b> 5 3 2 1 <b>2</b> <b>3</b> <b>6</b> <b>1</b>	six notes on p. 6
p. 6	TOL:	3 5 3 2 <b>2</b> 1	are omitted in page 7

Thus, the mistaken addition of a note in TOL and a flawed analysis marked by the selective and self-contradictory omission of six out of eleven notes (i.e., 54.5%) of this melody in TOL undercut Dr. Stewart’s analysis because:

- (a) Dr. Stewart selectively removed two pitches from the nine-pitch LGIO melody he transcribed on page 6 in order to create a 3 5 3 2 2 1 2 pitch sequence melody that does *not* exist in that sequence in LGIO;
- (b) Dr. Stewart selectively removed six pitches from the eleven-pitch TOL melody he transcribed on page 6 in order to create a 3 5 3 2 2 1 pitch sequence melody that does *not* exist in that sequence in TOL;
- (c) At the bottom of page 6 and continuing into page 7, Dr. Stewart mistakenly adds an extra pitch “**2**” that contradicts his own transcription and charts earlier on page 6, and creates a “**2 2**” pitch sequence that does *not* exist in TOL as transcribed by Dr. Stewart;



- (d) Even after this *mistake, omission and manipulation*, Dr. Stewart's creation of pitch sequences (1) do *not* exist in LGIO or TOL and (2) still end differently; and
- (d) The mere sequence of pitches, 3 5 3 2 2 1 and 3 5 3 2 1, divorced of their rhythmic durations, is *not* melodically significant or distinctive.

48. In the middle of page 7 of his report, Dr. Stewart continues as follows:

*"It is also significant that melodic figures involving the pitches 35653 and 565 abound in LGIO. One illustration is provided in example 5. Not only does example 5 contain the 35653 sequence from which the verses of TOL are built, but the entire sequence consists of just these three pitches: 6535653356. Other instances of similar figures in LGIO are found at 1:32, 1:42, 2:17, 3:47, and 4:02."* [p. 7, the Stewart report]

Dr. Stewart's analysis above is undermined by his selective omission of notes in the melodies under analysis and self contradiction because:

- While near the top of page 7 in the Stewart report, the 3-5-3-2-2-1 sequence of pitches is the "essential melodic gesture" of the opening theme in TOL, by the middle of page 7 in that report, three of those six scale degrees (2-2-1) have been *omitted* because they are different from the LGIO melody in the middle of the same page;
- By further way of *self-contradiction*, earlier on the same page 7, Dr. Stewart omits the pitches "5-6" in the 3-5-6-5-3 (2-2-3-1) sequence in TOL to create 3-5-3;

- The 3 5 6 5 3 sequence of five pitches are part of an eleven-pitch melody transcribed on page 6 in the Stewart report, and thereby, six of the eleven pitches in the melody as transcribed on page 6 in the Stewart report are *omitted* in order to resurrect the 3 5 6 5 3 sequence, even though the “5-6” pitches were *omitted* earlier in the Stewart report in order to claim a similarity with another melody in LGIO;
- Dr. Stewart’s transcription in Example 5 on page 7 of his report brackets the 3-5-6-5-3 pitches above the words “it on” but he does not explain why these particular five pitches, corresponding to two words at the end of a larger lyrical and melodic phrase (from which he has *omitted* two words and two notes), should be considered as a single unit;
- Dr. Stewart also fails to note that the four pitches above the word “on” are an ornament that occurs only *once* in LGIO; and
- Dr. Stewart does not and cannot find the ten-pitch sequence 6 5 3 5 6 5 3 3 5 6 that is in LGIO in his Example 5 anywhere in TOL.

49. Moreover, Dr. Stewart does not explain why this manipulated pitch sequence devoid of any melodic rhythm, is significant. (After all, there are only 7 pitches in a musical scale, 1-2-3-4-5-6-7.) Moreover, it appears that Dr. Stewart’s list of “instances of similar figures” in LGIO in the paragraph immediately below Example 5 refers to Marvin Gaye’s falsetto “oohs”, none of which have the sequence “3 5 6 5 3.” The actual pitch sequences in the “oohs” sung by Marvin Gaye in Dr. Stewart’s “instances of similar figures” in LGIO are charted as scale degrees immediately below.

At 1:32 in LGIO: 6-5-6  
At 1:42 in LGIO: 6-5-6  
At 2:17 in LGIO: 5-6  
At 3:47 in LGIO: 6-3-5-6 (only in the single version)  
At 4:02 in LGIO: 6-5-3 (only in the album version)

50. Dr. Stewart's scant consideration of the melodic rhythm in these melodic figures is cited immediately below:

*"In terms of the rhythms, phrasing, and metric placement, the phrases in example 4 also share significant similarities."* [p. 7, the Stewart report]

Dr. Stewart fails to provide any transcriptions or analysis to support that finding.

## II (G). PAGE 8 OF THE STEWART REPORT

51. On page 8 of his report, Dr. Stewart segues to an analysis of a melody in the Chorus in TOL as follows:

*"[T]he melody in each song features repeated notes descending from 5 to 3 with a penultimate note on 2 before the final 3."* [p. 8, the Stewart report]

However, the similarities in the melodies from LGIO and TOL in Dr. Stewart's Example 6 are weak at best. The pitch sequences are not the same, and the melodic rhythm and metrical placements are different as transcribed in the Stewart report's Example 6. Moreover, in terms of the melodic contour, the pitch sequence from LGIO descends to scale degree "1" firmly on beat 4, but the pitch sequence from TOL does not even include scale degree "1". In addition, the main similarity is that both pitch sequences contain the notes of a descending

major scale from 5 to 2, which is a musical building block. When the *different* pitches sequences are considered, as well as the *different* melodic rhythms of those pitches, the purported melodic similarity Dr. Stewart finds is a generic, musical building block.

52. Notably, and by way of self-contradiction to his earlier analyses, in this analysis, Dr. Stewart does *not* disregard *neighbor tones*, *short notes*, or *rhythmically weak notes*. Based on a review of the previous analyses in his report and the analysis under discussion, it appears that the Stewart report's *omission* of pitches only occurs when the result of those omissions is an increased similarity between melodies in LGIO and TOL.

53. Continuing in this line of analysis, Dr. Stewart further opines:

*"Variants of this passage can also be heard in LGIO at 0:17 and 3:38."* [p. 8, the Stewart report]

However, these supposed "variants" of the melody at 0:17 and 3:38 are only vaguely related as illustrated in the chart immediately below.

At 0:17 in LGIO: 5-4-b3-2-1-2

At 3:38 in LGIO: 5-4-4-3, 3-3-1-1 (only in the single version)

Dr. Stewart fails to provide any analysis of these supposed "variants".

## II (H). PAGE 9 OF THE STEWART REPORT

54. Dr. Stewart moves to an analysis of what he calls the "bridge" sections in LGIO and TOL and finds:

*"These bridges involve similar movement to harmony built on the supertonic or second degree of the scale (E minor in TOL and E7 in LGIO) and the dominant or A (ii-V and II7-V, respectively)." [p. 9, the Stewart report]*

55. First, as explained above, the Bridge of TOL is actually a "Pre-chorus." (For example, on Genius.com, this section in TOL is also called a "Pre-chorus". See <http://genius.com/Ed-sheeran-thinking-out-loud-lyrics>.) Nonetheless, for the purposes of this response to the Stewart report and for the sake of clarity, I will refer to this section in TOL as the "bridge", rather than the Pre-chorus.

56. The harmony Dr. Stewart finds to be similar merely consists of the *last* two chords of the LGIO "bridge" and the *first* three chords of the TOL "bridge." Not only does Dr. Stewart surgically remove these chords from different longer chord progressions in the "bridges" of LGIO and TOL, each of these harmonic snippets are not particularly similar and they are neither distinctive nor original.

57. Next, Dr. Stewart moves to an analysis of another purported *melodic* similarity in the "bridges" as follows:

*"While these melodies do not rise to the level of similarity of the previous comparisons, it is worth noting the 343432 sequence over the move toward the dominant harmony is found in both songs." [p. 9, the Stewart report]*

Noteworthy is that even Dr. Stewart admits that this purported melodic similarity is weaker than in his previous purported melodic similarities. As demonstrated above, Dr. Stewart's earlier melodic analyses lack any substance and rely on

selective omission and self-contradiction to create similarities between fragments of longer melodies wherein no meaningful similarity exists.

58. Dr. Stewart finds the presence of the pitch sequence 3-4-3-4-3-2 in these melodies. However, the 3-4-3-4-3-2 sequence of six pitches in LGIO is part of a melody that consists of sixteen pitches as transcribed and charted by Dr. Stewart on page 9 of his report. Thus, Dr. Stewart omitted ten out of sixteen pitches, i.e., he omits 62% of the pitches in the melody he places in issue in LGIO. He also omits ten out of sixteen pitches in the TOL melody. Moreover, while the 3 4 3 4 3 2 sequence of pitches is at the end of the LGIO melody, it is not at the end of the TOL melody, as transcribed and charted by Dr. Stewart. Dr. Stewart continues to ignore substantial differences in the *melodic rhythms* in these two melodies. He also ignores the fact that the iterations of scale degree “4” in LGIO are clearly ornamental. In fact, the iterations of scale degree 4 in the 3-4-3-4-3-2 pitch sequence in LGIO possess all of the three criteria that Dr. Stewart used to place notes in parentheses (and discard altogether) in his previous analysis:

- (1) “function as neighbor”;
- (2) “extremely brief duration” and
- (3) “weak rhythmic placement”.

Indeed, using the same flawed analysis Dr. Stewart uses on page 6 of his report, the “3-4-3-4-3-2” he finds in LGIO on page 9 of his report could be reduced to a mere scale degree “3”.

59. Dr. Stewart also finds it notable that the “3-4-3-4-3-2” pitch sequence occurs “over the move toward the dominant harmony”. In fact, their placement relative to the dominant chord is different in LGIO and TOL: the “3-4-

3-4-3-2" pitch sequence in LGIO occurs *during* the V chord in LGIO, but in TOL the pitch sequence ends *a full beat before* the V chord, *as transcribed in Example 7 by Dr. Stewart.*

60. At the bottom of page 9 (and moving to page 10) of his report, Dr. Stewart presents "a final melodic comparison" regarding the "la, la, la" melody at 3:35 during the interlude of TOL and a melodic phrase in LGIO. Dr. Stewart writes:

*"This passage shares significant similarities with one of the most memorable phrases heard in LGIO."* [p. 9, the Stewart report]

#### II (I). PAGE 10 IN THE STEWART REPORT

61. Staying with this "final melodic comparison" from page 9 which continues to the top of page 10 in his report, Dr. Stewart finds that the descending melody in the "la, la, la" phrase in TOL is copied from the melody in the phrase "we're all sensitive people" in LGIO. However, there are very few similarities between these phrases because:

- The melodic rhythms are substantially different;
- TOL consistently descends over the course of approximately 4 beats, but LGIO moves from scale degrees "8" to "7" and then back *up* to scale degree "8" before descending very quickly to scale degree "2" resulting in a different melodic contour; and
- The similar downward pitch movement consists of scale degrees 8-7-6-5-3, the first four pitches of which are a descending minor scale, which is a musical building block.

Thus, the similarity here is limited to a musical building block, plus scale degree 3, set to very different melodic rhythms.

62. Dr. Stewart also engages the use of this melody from LGIO in one of Ed Sheeran's live performances.

*"Tellingly, Ed Sheeran himself quotes this passage from LGIO when he goes into 'Let's Get It On' during a live performance."* [p. 10, the Stewart report]

However, Ed Sheeran's inclusion of this passage during a live performance, like the creation of a "mashup" of LGIO and TOL, is not musicological evidence of copying LGIO during the *creation* of TOL.

#### II (J). PAGE 11 IN THE STEWART REPORT

63. Surprisingly, Dr. Stewart mistakenly copies and mistakenly agrees with an obvious "typo" on page 2 of my "Draft" outline summary in the section marked "HARMONY".<sup>3</sup> On page 2 of my "Draft" outline summary, I list the second chord in the LGIO chord progression as a "ii7" chord. Obviously, the second chord in LGIO is a "iii7" chord, not a "ii7" chord. This is confirmed in the chord symbols indicated over the transcription of LGIO on pages 5 and 6 of my "DRAFT" outline summary.

64. Dr. Stewart finds, *"The opening chords of the bridges are closely related (E minor7 or ii7 in TOL and G major or G7 or IV in LGIO)".* [p. 11, the Stewart report] First, Dr. Stewart fails to inform his reader that the chord

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<sup>3</sup> See the section marked "Harmonies" starting at the bottom of page 10 and continuing to the top of page 11 in the Stewart report. As to my "DRAFT" outline summary, this typo is also found on page 3 wherein the basic chord progression in LGIO is obviously I iii IV V.



progressions and the harmonic rhythm in the “bridges” in LGIO and TOL are very different: LGIO opens with a “IV” chord that last for *two* measures followed by a single measure consisting of “I” and “iii” chords, but TOL opens with a “ii7” chord and the second measure in the “bridge” consists of “V7” and “I” chords. These substantial and obvious harmonic differences between TOL and LGIO *continue throughout the “bridge” sections*. Dr. Stewart merely finds a similarity<sup>4</sup> in a single chord that (1) is not even the same in TOL and LGIO, (2) is different in harmonic rhythm in TOL and LGIO, and (3) is merely the first chord in different overall chord progressions in the “bridge” in TOL as compared with the “bridge” in LGIO.

65. Moving to the “modal qualities” in LGIO and TOL, Dr. Stewart opines:

*“While LGIO has a bluesier and more soulful vocal, both songs employ inflections on various pitches of the scale (especially the third degree) and as can be seen in example 2, Sheeran’s melody contains ‘bent’ notes that include F-natural as well as F-sharp.”* [p. 11, the Stewart report]

In the citation immediately above, Dr. Stewart attempts to downplay the obvious modal differences in the songs, finding that Ed Sheeran, like Marvin Gaye, also uses “bent” notes. While the commonplace use of “bent” notes is in LGIO and TOL, the (flatted) “b3’s” sung by Marvin Gaye are *not* inflections or ornaments but actual notes in the melody. My analysis is supported by the fact that there are numerous occurrences of “b3” in the LGIO published sheet music, but *none* in the TOL published sheet music.

66. Moving to an analysis of the lyrics in LGIO and TOL, Dr. Stewart opines:

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<sup>4</sup> While “ii7” and “IV7” chords share notes, they are not identical and the harmonic effect of scale “2” versus scale degree “4” in the bass is different.

*"While, like Dr. Ferrara, I have found no important lyrical similarities, I must take issue with his statement that 'the lyrics in 'Let's' are about immediate sexual attraction while the lyrics in 'Thinking' are about long-term romantic love' (undated Ferrara report). Despite LGIO's more overt sexuality, TOL also contains not-so-subtle sexual and erotic overtones."* [p. 11, the Stewart report]

First, Dr. Stewart concedes that there are "no *important* lyrical similarities" between LGIO and TOL. As to TOL's purported "not-so-subtle sexual and erotic overtones", Dr. Stewart fails to provide any examples of this in TOL.

67. Dr. Stewart also opines:

*"Further, the lyrics to Gaye's song repeatedly emphasize romantic love 'If you believe in love....'"* [p. 11, the Stewart report]

However, this is the only example of "romantic love" in LGIO Dr. Stewart provides, and the phrase, "If you believe in love", does not necessarily refer to "romantic" love.

68. Finally, Dr. Stewart opines that *"In the end, both ballads are celebrations of love to a particular woman."* [p. 11, the Stewart report] However, this description would apply to hundreds if not thousands of songs and cannot possibly support a claim of copying.

#### II (K). PAGE 12 IN THE STEWART REPORT

69. On page 12 of his report, Dr. Stewart responds to the "prior art" listed in my "DRAFT" summary outline.

*“Dr. Ferrara’s report mentions ten songs that he claims pre-date LGIO that contain similar harmony. I have carefully examined all of these songs and found none that contain the bass line and drum part at issue in this matter.” [p. 12, the Stewart report]*

First, Dr. Stewart does *not* mention the harmonic similarities I found between the prior art works listed and discussed on pages 3-4 in my “DRAFT” summary outline. By failing to rebut, let alone discuss, the harmonic similarities in the prior art listed and discussed in my “DRAFT” outline summary, Dr. Stewart concedes my finding that the chord progression in LGIO *is* found in these prior art works. Indeed, those prior art works strongly demonstrate that the chord progression at issue was commonplace before its use in 1973 in LGIO.

70. Second, Dr. Stewart tries to circumvent this uncomfortable fact by only mentioning “the bass line and the drum part at issue...” in his response to my prior art, as cited immediately above. Dr. Stewart failed to analyze or transcribe the *bass* parts in TOL and delimited his analysis of the bass line in TOL to the lowest notes in the *opening guitar figure*. The drum part does not play with the guitar in the opening of TOL. Thus, any suggestion of a combination of the actual bass guitar part and the drum part being at issue fails because the actual bass part in TOL has many differences with the bass part in LGIO, differences that are omitted throughout the Stewart report.

71. Third, as demonstrated above and in the transcription of the bass part at 1:13 in TOL on page 5 of my “DRAFT” summary outline (which Dr. Stewart tellingly chose to ignore and *omit* from his analysis), the bass part in TOL is different from the bass part in LGIO.

72. Thus, not only does Dr. Stewart fail to rebut the presence of the chord progression at issue in LGIO in the numerous prior art works in my “DRAFT” outline summary, his report completely fails to establish any meaningful

similarity in the bass parts in LGIO and TOL. The only similarity that is left is in the drum part, as further analyzed below.

### **III. PRIOR ART**

73. As noted in my “DRAFT” outline summary, the similarity between LGIO and TOL is (1) in the chord progressions and (2) bass part in LGIO and the lowest note in the guitar part during the opening of TOL. The *actual* bass part that enters at 0:24 and continues in TOL is not the same as the bass part in LGIO, and embodies many differences including differences in intervals, melodic contours, and rhythmic durations. Thus, there is no significant similarity in the bass parts between TOL and LGIO. Regarding the chord progressions, the “I iii IV V” chord progression in LGIO was commonplace before it was used in 1973 in LGIO. Dr. Stewart does not rebut this finding regarding the commonplace status of the chord progression in LGIO in his report. As noted above, in the “prior art” section of his report, Dr. Stewart only engages (1) the “bass line” (delimiting his analysis to the lowest note of the guitar at the opening of TOL) and (2) the “drum part” in the prior art listed in my “DRAFT” outline summary. He fails to mention or rebut the presence of the *chord progression* in LGIO in the prior art works listed and discussed in my “DRAFT” outline summary. Thus, Dr. Stewart’s report concedes that the *chord progression* in LGIO was commonplace before its use in 1973 in LGIO as presented in my “DRAFT” outline summary.

74. On that basis, immediately below I demonstrate that the *combined* chord progression and bass line in LGIO was in common use prior to 1973, the year in which LGIO was released. Following that, I respond to Dr. Stewart’s analysis of the drum parts in LGIO and TOL.

III (A). PRIOR ART REGARDING THE BASS PARTS IN LGIO AND TOL

75. As demonstrated above, the Stewart report fails to present any transcription or analysis of the bass parts in TOL. Dr. Stewart delimits his analysis of the bass line in TOL to the lowest notes in the *opening guitar figure*. He never informs his reader that he has *omitted* the bass parts in TOL and that he has *omitted* numerous notes in the guitar part that he substitutes for the bass parts in TOL.

76. Moreover, as demonstrated above, the bass parts in TOL and LGIO are not the same and embody many differences including differences in intervals, melodic contours, and rhythmic durations. Thus, there is no significant similarity in the bass parts between TOL and LGIO.

77. On page 12 of his report, Dr. Stewart writes:

*The only example among the works mentioned by Ferrara that contains a descending sixth in the bass is Donovan's 'Hurdy Gurdy Man'.*" [p. 12, the Stewart report]

First, this is a bogus point because the bass parts in TOL do *not* contain a descent of the interval of a "sixth to scale degree 3".

78. Second, as demonstrated in the transcriptions Musical Examples 5-9 immediately below, in addition to "Hurdy Gurdy Man", four additional prior works listed in my "DRAFT" outline summary include (1) the "I iii IV V" chord progression in LGIO and (2) the descent of the interval of a "sixth to scale degree 3" in at least one iteration of their bass parts: "True Love Ways," "Once Upon a Dream," "Fun, Fun, Fun," and "A Summer Song."

### MUSICAL EXAMPLE 5

**“True Love Ways”**

**(Buddy Holly, 1960)**

Time: 0:03



### MUSICAL EXAMPLE 6

**“Once Upon a Dream”**

**(Billy Fury, 1963)**

Time: 1:05



### MUSICAL EXAMPLE 7

**“Fun, Fun, Fun”**

**(The Beach Boys, 1964)**

Time: 0:37

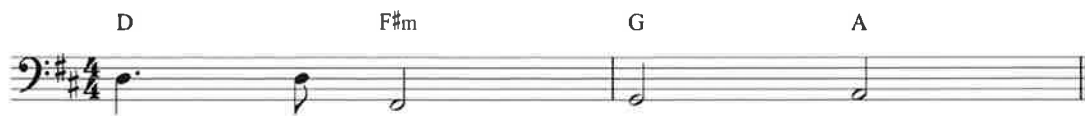


**MUSICAL EXAMPLE 8**

**“A Summer Song”**

**(Chad and Jeremy, 1964)**

Time: 0:10



**MUSICAL EXAMPLE 9**

**“Hurdy Gurdy Man”**

**(Donovan, 1968)**

Time: 1:05



79. In addition to the five prior art works transcribed immediately above, “Last One to Know” recorded by The Fleetwoods and released in 1961 includes (1) the chord progression at issue in LGIO and (2) the descent of the interval of a “sixth to scale degree 3” in its bass part as demonstrated in Musical Example 10 immediately below.

**MUSICAL EXAMPLE 10****"Last One to Know"****(The Fleetwoods, 1961)**

Time: 0:00



80. Moreover, The Ventures' 1967 recording of "Georgy Girl" as well as the 101 Strings Orchestra's 1967 recording of "Georgy Girl" include (1) the chord progression at issue in TOL and (2) the descent of the interval of a "sixth to scale degree 3" in their bass parts as demonstrated in Musical Examples 11 and 12 immediately below.

**MUSICAL EXAMPLE 11****"Georgy Girl"****(The Ventures, 1967)**

Time: 0:01





**MUSICAL EXAMPLE 12****"Georgy Girl"****(101 Strings Orchestra, 1967)**

Time: 0:32



81. Thus, even *if* the actual bass part in TOL included the descent of the interval of a "sixth to scale degree 3", and it does not, that hypothetical similarity with the bass part in LGIO would not be significant because the use of a descending interval of a sixth to scale degree 3 in the bass part *combined* with the chord progression in LGIO or TOL was already commonly used in at least the eight prior art works transcribed above.

82. Moreover, the 1964 hit, "Downtown" by Petula Clark, includes the chord progression at issue in LGIO and, more similarly to the bass part in TOL, ascends an interval of a "third" from the first chord to the second chord, and ascends thereafter through scale degrees 4 and 5 as demonstrated in Musical Example 13 immediately below.

**MUSICAL EXAMPLE 13****"Downtown"****(Petula Clark, 1964)**

Time: 2:03



83. In summary, the *combined* chord progression and the descending interval of a sixth to scale degree 3 in the bass part in LGIO were commonly in use prior to 1973, the release year of LGIO.

### III (B). PRIOR ART REGARDING THE DRUM PARTS IN LGIO AND TOL

84. As analyzed in Paragraphs 29 – 31 above, the Stewart report presents an analysis of the drum patterns in LGIO and TOL and finds that “*The basic drum pattern in both songs is also identical.*” [p. 4, the Stewart report] However, the drum patterns are *not* identical as Dr. Stewart claims: (1) Dr. Stewart’s transcription adds a kick attack (or hit) on beat 4 of TOL, but that attack is not there, and (2) his transcription adds a hi-hat hit on beat “1&” in the first bar of LGIO, but that attack is not there, as illustrated in Musical Example 4 on page 15 above.

85. The combined kick and snare drum pattern in TOL (which, as noted above, does *not* include an attack on beat 4) is not remarkable. The same *kick and snare drum pattern* is in the beat in Toni Basil’s huge 1982 hit, “Mickey”, demonstrated in Musical Example 14 immediately below. (There is no hi-hat part in the opening of “Hey Mickey”.)

### MUSICAL EXAMPLE 14

#### “Hey Mickey” / “Thinking Out Loud”

#### Drums

The image displays two staves of musical notation for drums. The top staff is labeled "Hey Mickey" with a time signature of 0:00. It shows a drum pattern with a kick drum on the first beat, followed by a snare drum on the second beat, and a hi-hat on the third beat. The bottom staff is labeled "Thinking Out Loud" with a time signature of 0:24. It shows a similar drum pattern, but with a kick drum on the first beat, followed by a snare drum on the second beat, and a hi-hat on the third beat. The notation uses standard drum symbols: a vertical line for the kick drum, an 'x' for the snare drum, and a cross for the hi-hat.

86. The same kick drum pattern combined with eighth notes in the hi-hat in TOL is also in the student drum method book, *Mel Bay's Funk Drumming* (1982). The book's cover page and the page that contains the drum pattern (with a hand-written arrow to identify the drum pattern) are attached as Visual Exhibit A. Thus, the drum pattern in this student drum method book embodies the same kick drum and hi-hat cymbal rhythm.

87. In addition, the entire kick drum, snare drum, and hi-hat cymbal pattern in TOL is in the student drum method book, *FastTrack Music Instruction: Drums2* (1997). The book's cover page and the page that contains the drum pattern (with hand-written arrows to identify the six iterations of the drum pattern) are attached as Visual Exhibit B. This identical drum pattern is measure 1 of a repeating two-measure drum pattern.

88. The drum parts in LGIO and TOL are not identical. On the other hand, (1) the identical kick and snare drum pattern in TOL is in the 1982 hit, "Mickey", (2) the identical kick drum and hi-hat cymbal in TOL is in a student drum method book published in 1982, and (3) the identical complete drum rhythm (i.e., the identical kick drum, snare drum, and hi-hat patterns) in TOL is in a student drum method book published in 1997.

89. Tellingly, while Dr. Stewart transcribes the *drum part* at 0:24 in TOL in Example 2 in his report, nowhere does he transcribe the *bass part* at 0:24 in TOL. Moreover, in Example 3 on page 5 of his report, Dr. Stewart transcribes *both* the bass part *and* the drums in LGIO. The Stewart report effectively hides the fact that the bass parts in TOL and LGIO are different, including the absence of the descent of an interval of a sixth to scale degree 3 in the bass part in TOL. Moreover, the Stewart report delimits the analysis of the bass in TOL to the lowest notes in the guitar part at the opening of TOL. However, that guitar part does *not* play with the drums during the opening of TOL.

90. The bottom line is that Stewart report fails to provide any analysis of the combination of the *actual bass guitar part* with the drum part in TOL.

### **III. CONCLUSIONS**

91. On the basis of a careful review of the Stewart report and my “DRAFT” outline summary, I continue to stand by my analysis and findings in my “DRAFT” outline summary, namely, that there are no significant structural, harmonic, rhythmic, melodic, or lyrical similarities between LGIO and TOL individually or in the aggregate. Thus, the Stewart report has not changed my findings or opinions regarding LGIO and TOL.

92. It is my professional opinion that the Stewart report is rife with selective omission and self-contradiction. Many purported similarities are too remote and manufactured to be of any significance, individually or in combination with other similarities presented in the Stewart report. Dr. Stewart’s findings of purported melodic similarities lack any substance and rely on selective omission and self-contradiction to create similarities between fragments of longer melodies wherein no meaningful melodic similarity exists.

93. As a result of a further but “preliminary” search for prior art regarding the similarity between LGIO and TOL, I found that the chord progression and bass line in LGIO were in common use prior to 1973, the year in which LGIO was released. Any remaining similarity in the drum parts is not remarkable, and can be found in student method books. I am confident that a further search for prior art would find additional works that support my findings.

94. On that basis, it is my professional opinion that the similarities in LGIO and TOL do not suggest copying, and any similarities are insignificant.

95. This Response is not intended to be full recitation of my analysis or opinion on this matter, and I reserve the right to supplement this analysis should this matter proceed.

Respectfully submitted,

October 6, 2015

By: Lawrence Ferrara, Ph.D.

A handwritten signature in black ink, appearing to be 'Lawrence Ferrara', written over a horizontal line.

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For: Lawrence Ferrara, Inc.